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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

AARON WESTENDORP,
A Minor with Disabilities, et al.,

Petitioners,

-versus-

JESSE "THE BODY" VENTURA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997) "changed the law" of the Establishment Clause, such that a governmental defendant's reliance on earlier precedent (*Aguilar v. Felton*, 473 U.S. 402 (1985)) for its policy of denying special education to children with disabilities attending religious schools, absolves the defendant of liability for attorney fees under 42 U.S.C. §1988?

II. Whether, in an action under 42 U.S.C. §1983, intervening case law favorable to a plaintiff's position on an important legal issue defeats the plaintiff's entitlement to attorney fees under 42 U.S.C. §1988, where the plaintiff prevails in obtaining relief in part because of the new, favorable precedent?

III. Whether the "catalyst" theory of attorney fee entitlement under 42 U.S.C. §1988 remains operative following *Farrar v. Hobby*, 506 U.S. 103 (1992) (*see Friends of the Earth v. Laidlaw Environmental Services*, ___ U.S. ___, 120 S.Ct. 693, 711-12 (2000))?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to this proceeding are:

Petitioners:

Aaron Westendorp, a minor with disabilities, by and through his parents and natural guardians, Krista and Douglas Westendorp, Krista and Douglas Westendorp individually, Sarah Peter, a minor with disabilities, by and through her parent and natural guardian, Joan Peter, Joan Peter individually.

Respondents:

Jesse "The Body" Ventura, Governor of the State of Minnesota, and Christine Jax, Commissioner of Minnesota Department of Children, Families and Learning.

Non-Respondent Parties in Merits Proceedings Below:

Independent School District No. 877 (Buffalo, Minnesota) and Independent School District No. 273 (Edina, Minnesota).

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Petitioners Aaron Westendorp, Krista Westendorp, Douglas Westendorp, Sarah Peter, and Joan Peter respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The attorney fee opinion of the Court of Appeals (Pet. App. 1-30), for which certiorari review is sought, is reported at 187 F.3d 829. The attorney fee opinion of the District Court (Pet. App. 31-92) is reported at 18 F.Supp.2d 1002. The final merits opinion of the District Court in favor of petitioners (Pet. App. 93-106) is reported at 35 F.Supp.2d 1134. The merits opinion of the Court of Appeals in favor of petitioners (Pet. App. 107-148) is reported at 155 F.3d 992. The initial merits opinion of the District Court (Pet. App. 149-206) is reported at 958 F.Supp. 1383.

JURISDICTION

The judgment of the Court of Appeals, 187 F.3d 829 (Pet. App. 1-30), was entered on August 13, 1999. Petitioners filed a petition for rehearing and rehearing en banc on August 27, 1999, which was denied on September 30, 1999 (Pet. App. 207).[1] By order of December 13, 1999 (Pet. App. 263), Justice Thomas extended the time for filing a petition for writ of

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[1]On November 1, 1999, petitioners filed an Application with Chief Judge Wollman for leave to file a motion for reconsideration in light of the conflicting intervening attorney fee decision in *Carhart v. Stenberg*, 192 F.3d 1142, 1151-52 (8th Cir. 1999), *cert. granted in part*, 120 S.Ct. 865 (Jan. 14, 2000). By order of November 9, 1999 (Pet. App. 208), Chief Judge Wollman referred petitioner's Application to the full court and ordered briefing thereon. By order of December 27, 1999 (Pet. App. 209), the Court of Appeals denied petitioner's Application on the ground that there is "no provision in the Court's rules for the filing of [such] an application ...."

certiorari to February 27, 2000. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

1. ***Introduction and Overview.*** This case presents questions concerning the application of the civil rights attorneys fees statute, 42 U.S.C. §1988(b), to situations where a plaintiff has prevailed in part because of an intervening decision of this Court favorable to the plaintiff on an important issue. Petitioners (plaintiffs below) are two families that successfully challenged a Minnesota rule that *prohibited* on-site special education for children with disabilities attending religious private schools but *required* such services for children attending non-religious private schools. Petitioners challenged the rule as a violation of the Free Speech, Free Exercise, and Equal Protection clauses of the U.S. Constitution, of the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"), and of state law. The State of Minnesota defended on numerous grounds, including that its disparate treatment of children with disabilities attending religious schools was required by the Establishment Clause.

A year into the litigation, following a decision of the district court sustaining plaintiffs' constitutional claims, *Peter v. Johnson*, 958 F. Supp. 1383, 1395 (D.Minn. 1997) (Pet. App. 149), and after completion of discovery against the State, this Court decided *Agostini v. Felton*, 521 U.S. 203 (1997). *Agostini* rejected an Establishment Clause argument similar to the one asserted by Minnesota in the instant case. After *Agostini*, the State abandoned its defense of the rule and agreed to an injunction against its enforcement. Pet. App. 253 (Injunction). *See Peter v. Wedl*, 155 F.3d 992, 997 (8th Cir.

1998) (Pet. App. at 122-23) (The state rule "violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection, and the district court properly enjoined its enforcement."). Plaintiffs went on to obtain full relief against all defendants, including the school districts that had denied special education to the plaintiff families in part because of the state rule. *See* Pet. App. 256 (Peter settlement with Buffalo district); 155 F.3d 992 (Pet. App. 107) (Eighth Circuit merits decision in Westendorps' favor against Edina district); *Westendorp v. ISD #273*, 35 F.Supp. 2d 1134 (D. Minn. 1998) (Pet. App. 93) (awarding full relief against Edina on remand).

Following the injunction against the State, petitioners sought attorneys fees pursuant to §1988. The Court of Appeals held that petitioners were not "prevailing parties" against the State on the grounds that *Agostini* changed the applicable law of the Establishment Clause mid-stream; that the State had relied on pre-*Agostini* case law; and that the State abandoned its defense following *Agostini*. *Peter v. Jax*, 187 F.3d 829 (8th Cir. 1999) (Pet. App. 1). It was "*Agostini*, not the litigation" (*id.* at 835; Pet. App. at 16) that caused the state's change in position, and consequently, petitioners did not "prevail" in the case. *Id.* at 834 (Pet. App. 15-16) ("[B]ecause of the intervening and dispositive *Agostini* decision, we do not believe the general rule [of awarding fees where litigation leads to a settlement or consent decree] is applicable."). Petitioners seek review of this ruling.

2. *The Merits Litigation.* The facts are fully set forth in the Eighth Circuit's decision for petitioners on the merits. *Peter v. Wedl*, 155 F.3d at 994-996 (Pet. App. 114-19). The underlying litigation involved the denial of special education services to two children with disabilities, because their families had enrolled them in religious schools. *Id.* at 996-97

(Pet. App. 121-25). Petitioner Aaron Westendorp (ages 10-13 during the litigation) suffers from severe disabilities resulting from a brain stem lesion. He is partially paralyzed from the eyes down, breathes through a permanent tracheotomy tube, eats through a permanent gastrostomy tube, and cannot speak. He has full cognitive functions, however, and communicates through finger spelling. Petitioner Sarah Peter (ages 5-7) suffers from disabilities associated with Down Syndrome. Both children were determined by their public school districts to be entitled, under the IDEA and relevant state law, to have a one-on-one paraprofessional assist them in a regular classroom setting. *See Peter v. Johnson*, 958 F.Supp. at 1387-88 (Pet. App. at 164-65).

Both children were initially enrolled in religious schools. However, their school districts refused to provide Aaron or Sarah with a paraprofessional at a religious school, relying on Minnesota Rule 3525.1150 ("state rule"), and both families were forced to withdraw their children from those schools in order to obtain the services they needed. The state rule, until enjoined by the District Court (*see* Pet. App. 253), required local school districts to provide on-site special education services to children attending *nonreligious* private schools, but forbade such services if the child attended a *religious* private school. *Peter v. Wedl*, 155 F.3d at 994-96 (Pet. App. at 114-16, 121).

The chronology of events is important: Petitioners filed suit on July 26, 1996 against state officials responsible for enforcing the state rule, seeking an injunction against the rule's enforcement to deny Aaron and Sarah paraprofessionals at religious schools. Plaintiffs also named as defendants the two school districts where the children live. Plaintiffs moved for preliminary injunctive relief to permit Aaron and Sarah to

receive paraprofessionals at the families' chosen religious schools that fall. The school districts raised the state rule as a defense. The State raised many defenses, arguing that plaintiffs lacked standing; that plaintiffs had failed to exhaust administrative remedies; that the suit was unripe; that the Complaint failed to state affirmative claims to relief under the Free Speech, Free Exercise, and Equal Protection clauses; that the state rule was consistent with IDEA; and that the rule was required by the Establishment Clause. *Peter v. Johnson*, 958 F. Supp. 1383 (Pet. App. 149). However, the State's "primary defense in this case was that the school districts, in applying the rule, did not discriminate against these plaintiffs."[2]

The District Court denied petitioners' motion for expedited hearing and scheduled the motion for preliminary injunction to be heard together with defendants' motions to dismiss, on November 8, 1996.[3] The District Court ruled on the pending merits motions on March 26, 1997, rejecting the State's motion to dismiss plaintiffs' constitutional claims on the authority of this Court's decisions in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993):

> Plaintiffs allege violations of the Freedom of Speech and Free Exercise of Religion Clauses

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[2]The State acknowledged at the fees argument below (Feb. 20, 1998 Tr. at 24): "Our primary defense in this case was that the school districts, in applying the rule, did not discriminate against these plaintiffs.... That was our position from the outset of the litigation and it continues to be our position today."

[3]This Court granted certiorari in *Agostini* on January 17, 1997 (519 U.S. 1086 (Mem.)), two months after these motions were argued in the District Court – a fact that is significant to the chronology and legal issues presented below.

> of the First Amendment .... [T]he court concludes that plaintiffs have sufficiently alleged that defendants treat nonpublic religious schools differently from nonpublic nonreligious schools with respect to on-site paraprofessional services. Such allegations sufficiently allege violations of the First and Fourteenth Amendments of the U.S. Constitution to overcome defendants' motions to dismiss.

Peter v. Johnson, 958 F. Supp. at 1395 (Pet. App. at 185-86) (citations omitted).

The District Court ordered that discovery proceed on petitioners' constitutional claims. *Id.* at 1401 (Pet. App. at 206). On May 22, 1997, plaintiffs deposed the Director of Special Education for the State of Minnesota, Mr. Wayne Erickson. Mr. Erickson testified that the State's policy indeed required disparate treatment of children with disabilities attending religious private schools. *See Peter v. Wedl*, 155 F.3d at 994-995 (Pet. App. at 115-16) (citing deposition testimony of Mr. Erickson). Petitioners then prepared a renewed motion for a preliminary injunction, hoping to obtain relief in time for the 1997-98 academic year (a full school year having elapsed since the litigation began).

On June 23, 1997 – nearly a year after the Complaint in this case was filed – this Court decided *Agostini*. Following this Court's earlier decision in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), *Agostini* held that the Establishment Clause does not require denial of on-site education services at private religious schools under a neutral government program. The Court formally overruled its earlier decision in *Aguilar v. Felton*, 473 U.S. 402 (1985) as contrary to *Zobrest* and other cases. *Agostini*, 521 U.S. at 218-236.

Agostini did not involve any affirmative claim under the Free Speech or Free Exercise clauses challenging denial of services to children attending religious schools. The only question decided was whether the Establishment Clause *required* denial of such services.[4]

Following the decision in *Agostini*, counsel for the State wrote to counsel for plaintiffs asking that they put the litigation "on hold" pending the State's review of *Agostini*. Pet. App. 210 (letter from Rachel Kaplan, June 24, 1997). Counsel for plaintiffs replied that they were preparing a motion for a preliminary injunction to be filed shortly, and urged the State to abandon its defense of the rule, given *Agostini*. Pet. App. 212 (letter from Michael Paulsen, June 24, 1997) ("We believe that *Agostini* very strongly confirms plaintiffs' position in this litigation."). The State replied to plaintiffs' counsel, stating that it would no longer enforce the state rule, but adding that "[t]he State Defendants' position is that Plaintiffs' attorneys are not entitled to recover any attorney's fees in this matter. This litigation simply was not

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[4]As noted, this Court granted certiorari in *Agostini* two months after the merits motions had been argued in the District Court, and decided the case three months after the District Court had rejected the State of Minnesota's motions to dismiss, and following completion of petitioners' discovery against the State.

We note for the Court that counsel for petitioners in the instant case filed an amicus brief on behalf of the Peter and Westendorp families, in support of petitioners in *Agostini*, highlighting the facts of the Peter and Westendorp case and arguing that *Aguilar* should be overruled as contrary to *Zobrest*. *See* Brief of Sarah Peter, et al., 1997 WL 86250 (Feb. 27, 1997). Petitioners argued that *Aguilar* had the potential to mislead and confuse government officials, as illustrated by petitioners' litigation with the State of Minnesota. As explained below, the lower courts in this case thought it significant that counsel for petitioners were "aware" of *Agostini's* pendency and thought that this Court's anticipated decision in *Agostini* likely would be dispositive of the Establishment Clause issue in the instant case as well. *Peter v. Jax*, 187 F.3d at 837 (Pet. App. at 24).

the catalyst for the change/non-enforcement in the Rule." Pet. App. at 218 (letter from Rachel Kaplan, June 27, 1997). The State demanded that plaintiffs agree to dismiss the suit against the State Defendants. *Id.* at 217.

Plaintiffs' counsel asked the State to withdraw its pending discovery and give binding assurances that it would permanently change the rule, as a condition of any dismissal. Pet. App. 221 & 228 (Paulsen letters of July 2 & 7, 1997). The State conceded that it could not bind the state rulemaking authority to change the rule, and that it could not assure the rule would not be invoked by the school districts against Aaron and Sarah, and therefore agreed to plaintiffs' requested injunction against enforcement of the rule until it was permanently changed. Pet. App. 244 (Stipulation). The District Court granted plaintiffs' motion, issuing the requested injunction against enforcement of the rule: "Plaintiffs' motion for a preliminary injunction against the State Defendants is hereby GRANTED. The State Defendants are hereby enjoined and restrained from enforcing Rule 3525.1150 insofar as it prohibits provision of special education services to Plaintiffs Sarah Peter and Aaron Westendorp on the premises of a private religious school." Pet. App. at 254.

Following the injunction against the State, the Buffalo School District settled with the Peter family, agreeing to provide Sarah a paraprofessional at a religious school and to pay $31,500 in damages and attorneys fees. The Edina School District abandoned its reliance on the state rule and attempted to defend its non-provision of a paraprofessional to Aaron Westendorp on other grounds. The District Court agreed with Edina's position and granted summary judgment against the plaintiffs. *See Peter v. Wedl*, 155 F.3d at 996 (Pet. App. at 119). The Eighth Circuit reversed, finding that Edina

"conceded that it relied on" the unconstitutional state rule and, further, that Edina's refusal to provide a paraprofessional at a private religious school also violated the IDEA. *Id.*, at 995-98, 1001 (Pet. App. at 116-26, 134-35). On remand, the District Court granted the Westendorp family full relief against the Edina district. *Westendorp*, 35 F.Supp.2d 1134 (Pet. App. 93).

The result of the litigation was that plaintiffs obtained full relief on the merits against all defendants: Plaintiffs obtained a consent decree against the State, enjoining enforcement of the unconstitutional state rule and mandating a permanent change in the rule; plaintiffs obtained a prompt settlement with the Buffalo district, granting full prospective relief and damages and fees in the amount of $31,500; and plaintiffs obtained, eventually, final permanent injunctive relief against the Edina district.

3. *The Fees Litigation*. Pursuant to the terms of the consent decree against the State, the matter of attorneys fees remained for further litigation. Pet. App. at 254-55.[5] A Magistrate Judge rendered the decision of the District Court, pursuant to 28 U.S.C. §636(c). *Peter v. Wedl*, 18 F.Supp.2d 1002 (D.Minn. 1998) (Pet. App. 31). The court denied attorneys fees on the ground that, "*[u]ntil the Supreme Court changed the law in its Agostini opinion*, the State Defendants, like the lower courts, were under a duty to follow prior Supreme Court precedent that was at odds with the result sought by the Plaintiffs in the litigation." 18 F.Supp.2d at 1020 (Pet. App. at 88) (emphasis added). The court reasoned that plaintiffs' litigation thus "was not the catalyst for the action taken by the State Defendants," *id.* at 1015 (Pet. App. at 74); rather, the change in policy was "the result of the Supreme

[5]The separate matter of attorneys fees against the Edina School District remains pending in the District Court.

Court decision in *Agostini*, as Defendants claim." *Id.* at 1015-16 (Pet. App. at 74).

The court concluded that, in the alternative, "special circumstances" justified denial of an award of attorneys fees. 18 F.Supp.2d at 1018 (Pet. App. at 83). The court stated that Congress's purpose in providing attorneys fees for prevailing parties in section 1983 actions was "'to encourage attorneys to prosecute constitutional *violations*.'" *Id.* at 1020 (Pet. App. at 88-89) (emphasis by District Court; citation omitted). In the court's view, the State had committed no "violation" of law warranting fees under §1988 because "[w]hen this action was commenced, the State Defendants were confronted with directly adverse, controlling Supreme Court precedent" they were bound to obey. *Id.* The court concluded that awarding fees under such circumstances would encourage litigation challenging existing precedent and that this was contrary to the purpose of the fees statute: "The objective of Congress, after all, is not to encourage lawsuits, but rather to encourage public officials to act in accordance with the Constitution." *Id.*

The Eighth Circuit affirmed.[6] The court agreed that, because *Agostini* intervened, plaintiffs were not prevailing parties within the meaning of 42 U.S.C. §1988. *Peter v. Jax*, 187 F.3d at 833-836 (Pet. App. at 12-22). The court acknowledged that a plaintiff is a prevailing party under §1988 if he obtains "'some relief on the merits of his claim ... against the defendant from whom fees are sought,' either through an enforceable judgment or comparable relief." *Id.* at 833 (Pet. App. at 12) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)). The court also acknowledged that plaintiffs had

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6 [6]Rehearing en banc was denied by a divided vote. Judge Richard S. Arnold and Judge McMillian voted to grant the rehearing petition. Pet. App. at 207.

obtained an enforceable order enjoining the State from enforcing its discriminatory rule. *Id.* at 832-33 (Pet. App. at 10-12). However, the court stated that "because of the intervening and dispositive *Agostini* decision, we do not believe that the general rule is applicable." *Id.* at 834 (Pet. App. at 15-16). Like the district court, the Eighth Circuit thought that the State's prompt change of position after *Agostini* meant that it had no responsibility for fees, even for the period preceding *Agostini*. "After *Agostini* was decided, it seems to us the entry of the stipulated injunction was at most a technical success, which would not entitle appellants to attorney's fees." *Id.* at 835 (Pet. App. at 17). "[A]ny relief obtained was the result of *Agostini*, not the litigation." *Id.* at 836 (Pet. App. at 20).

The Eighth Circuit also agreed that *Agostini* was a "special circumstance" justifying creation of an exception to statutory fee liability, for two reasons. "First, as the district court noted, until the Supreme Court's decision in *Agostini*, the State had no choice but to follow *Aguilar*, even though it might have been undermined by *Zobrest*." *Id.* at 837 (Pet. App. at 24). "This court has held that 'special circumstances ma[d]e a fee award unjust' against a defendant 'who did only what it reasonably believed was compelled by state law.'" *Id.* at 838 (Pet. App. at 27) (citations omitted).

Second, the court thought that since appellants' counsel were "aware" that this Court had granted certiorari in *Agostini*, petitioners should not have "continued to litigate the matter and incur fees," 187 F.3d at 837 (Pet. App. at 24), if they believed that *Agostini* would support their position on the Establishment Clause issue. *Id.* at 837-38 (Pet. App. at 24-25). The court thought denial of fees appropriate "'to discourage unnecessary litigation.'" *Id.* at 838 (Pet. App. at 25) (citations

omitted). The Eighth Circuit did not specify when plaintiffs should have discontinued their efforts to invalidate the state rule, but denied fees for the entire period of plaintiffs' litigation against the State.

Reasons for Granting the Writ

This case presents an important and recurrent question concerning the "retroactivity" of judicial decisions, *see Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), as applied to the issue of attorneys fees under 42 U.S.C. §1988: When, if ever, does intervening case law *favorable* to a section 1983 plaintiff's position break the chain-of-causation otherwise linking plaintiff's lawsuit and a defendant's change of conduct giving plaintiffs the relief sought, so that plaintiff can be said *not* to be a "prevailing party" within the meaning of section 1988? This case stands squarely at the intersection of this Court's decisions in *Harper*, embracing the rule of full retroactivity of judicial decisions, and *Farrar v. Hobby*, 506 U.S. 103 (1992), construing 42 U.S.C. §1988's "prevailing party" requirement.

The courts below held that this Court "changed the law in its *Agostini* opinion" (18 F.Supp.2d at 1020, Pet. App. at 88), and, accordingly, that Minnesota's good faith reliance on precedent and prompt abandonment of its Establishment Clause defense after *Agostini* negates any claim that plaintiffs "prevailed" in the litigation – even though plaintiffs succeeded in obtaining full relief in the form of a consent decree and injunction against enforcement of the state rule (and, ultimately, a permanent change in the rule). In substance, the courts below held that new judicial decisions on questions of constitutional law should not be given retrospective application in other pending cases, for attorneys fees purposes.

Peter v. Jax, 187 F.3d at 834 (Pet. App. at 15-16) ("[B]ecause of the intervening and dispositive *Agostini* decision, we do not believe the general rule is applicable.").

This case significantly affects incentives to bring civil rights litigation of all kinds. The decision of the Eighth Circuit directly conflicts with the decisions of two other federal circuits and a three-judge district court, *see infra* at 20-28, and enlarges the circuit conflicts over post-*Farrar* causation. *See Friends of the Earth v. Laidlaw Environmental Services*, ___ U.S. ___, 120 S.Ct. 693, 711-12 (2000) (noting the extensive conflicts on "catalyst" causation theory after *Farrar*). As suggested in *Laidlaw*, these issues present recurrent problems in §1983 litigation. *Id.* This Court's review is needed to resolve the direct conflict in the lower federal courts over the effect of intervening precedent on attorneys fees liability under §1988, to clarify the confusion and division that prevails in the lower courts over "causation" issues in §1988 fee litigation generally, and to correct the Eighth Circuit's erroneous decision -- a decision at odds with both this Court's retroactivity jurisprudence and with *Agostini* itself.

I. The Decision Below Conflicts with this Court's "Retroactivity" Cases and with this Court's Characterization of *Agostini v. Felton* as Not Having "Changed the Law" of the Establishment Clause.

The court below held that an "intervening and dispositive ... decision" of this Court that resolves an issue of law in a way helpful to the position of a section 1983 plaintiff in another pending case, deprives that plaintiff of attorneys fees under §1988. *See* 187 F.3d at 834 (Pet. App. at 15-16). Because the state initially acted in reliance on *Aguilar*, and

abandoned its Establishment Clause defense (and agreed to an injunction against its policy) following *Agostini*, plaintiffs were not "prevailing parties" against the State. Plaintiffs did not receive "any relief which was not mandated by *Agostini*." *Id.* at 836 (Pet. App. at 21) (internal punctuation omitted).[7]

1. The Eighth Circuit's holding directly conflicts with this Court's retroactivity analysis in *Harper*. *Harper* prohibited "the erection of selective temporal barriers to the application of federal law," 509 U.S. at 97, stating that

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review *and as to all events, regardless of whether such events predate or postdate our announcement of the rule.*

Id. (emphasis added). Under *Harper*, the law governing a case is – in *all* respects – the decisional law at the time the case is

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[7]The Eighth Circuit's characterization of *Agostini* as "intervening and dispositive" is itself dubious. *Agostini* notes that it was *Zobrest* that had changed the applicable rule and rejected the doctrinal underpinnings of *Aguilar*. *See Agostini*, 521 U.S. at 225 ("[I]t was *Zobrest* – and not this case – that created 'fresh law'"). Moreover, *Agostini* did nothing to *compel* the relief petitioners sought: invalidation of the State's religiously discriminatory rule for provision of special education services. At most, *Agostini* removed any shred of Establishment Clause *defense* the State might have had against petitioners' affirmative constitutional claims under the Free Speech and Free Exercise clauses. Petitioners' *affirmative* claims were supported by *Rosenberger*, 515 U.S. 819, and *Hialeah*, 508 U.S. 520, not by *Agostini*. Indeed, the District Court had already so held, sustaining plaintiffs' constitutional claims against the State's motions to dismiss months before *Agostini* was decided. *See Peter v. Johnson*, 958 F. Supp. at 1395 (Pet. App. at 186).

finally decided or settled, not (as the lower courts in this case believed) the law that existed at any prior time. Here, the lower courts erected a "selective temporal barrier" to application of this Court's decision in *Agostini*, as to the event of attorneys fees. The lower courts held that, for purposes of fees liability, the relevant governing law is the decisional law as it existed at the time suit was brought. *See* 18 F.Supp.2d at 1020 (Pet. App. at 89) (emphasizing that purpose of fee statute is to encourage suits against constitutional "*violations*" and that no violation of law existed "[w]hen this action was commenced," because State was acting in conformity with decisional law at the time), *aff'd*, 187 F.3d at 837 (Pet. App. at 24) ("[U]ntil the Supreme Court's decision in *Agostini*, the State had no choice but to follow *Aguilar*").

The lower courts reasoned that where a new judicial decision "changes the law," it would be unfair to award attorneys fees against governmental defendants who had relied on the former interpretation, *see* 187 F.3d at 834 & 837 (Pet. App. at 16 & 24) (noting State's reliance on *Aguilar*), and, indeed, *improper* to award fees to plaintiffs who challenged such reliance. *Id.* at 837-38 (Pet. App. at 23-25) (counsel should not have pressed claims if another pending case might resolve a legal issue common to the two cases); 18 F.Supp.2d at 1020 (Pet. App. at 90) ("[T]he idea of encouraging litigation is at odds with the goal of encouraging public officials to act in accordance with applicable decisions of the Supreme Court.").

This analysis is manifestly unsound, under *Harper*. The lower courts were required to treat this case, *as to all events* (509 U.S. at 97), as if *Agostini* had been decided before the suit was ever filed. New judicial decisions do not, as the district court believed, "change[] the law" (18 F.Supp.2d at 1020; Pet. App. at 88); they state what the law always was.

The *meaning* of the Establishment Clause was the same on the day petitioners filed suit as it was on the day *Agostini* was decided. The fact that *judicial interpretations* may change does not mean that this Court "changed the law" governing this case. The law governing this case – at all stages, as to all events – was *the First Amendment*. And *Agostini* states what the proper interpretation of the Establishment Clause is and always was.

To be sure, lower courts (and public officials) do not always understand this. Many lawyers and judges think of "the law" in terms of judicial decisions – a habit perhaps bred of the common-law case method of legal education. The lower courts' error here is thus perfectly understandable: if one thinks in such terms, then a government official's reliance on past precedent seems to be "compliance with the law." (The district court expressed doubt "whether this is even a [§]1983 action as to which [§]1988 would apply," Feb. 20, 1998 Tr. at 49-50, given that *Aguilar v. Felton* supported the State's policy at the time the litigation was commenced!)

This is not the law, however. Petitioners' §1983 suit challenged state conduct as not being in conformity with the correct understanding of the Constitution. Petitioners' claims on the merits were sustained in this regard, first by the District Court (as against a motion to dismiss), 958 F.Supp. at 1394-95 (Pet. App. at 186-87), and then by the Eighth Circuit. 155 F.3d at 996-998 (Pet. App. at 120-26). Petitioners defeated the State's defense of its rule and obtained an injunction against its enforcement. In short, petitioners *won*. That is all that matters. The State's reliance on *Aguilar v. Felton*, reasonable or not, is immaterial. Under *Harper*, petitioners were entitled to the full benefit of intervening favorable precedents of this Court. Courts "can scarcely permit the substantive law to shift and

spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule." 509 U.S. at 97 (internal punctuation omitted). *See also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (Opinion of Souter, J.). Courts have no authority selectively "to disregard current law or treat similarly situated litigants differently." *Harper*, 509 U.S. at 97, quoting *American Trucking Assns. v. Smith*, 496 U.S. 167, 214 (Stevens, J., dissenting).

To deny attorneys fees to petitioners because of an "intervening and dispositive" decision of this Court is to treat otherwise similarly situated litigants differently depending on whether it was their case, or some other, that announced a new interpretation of law – precisely the result disapproved in *Harper*. Suppose, for example, that *Agostini* had never been decided by this Court. Suppose the lower courts in the instant litigation had ruled against petitioners' claims on the merits, on the authority of *Aguilar*, and this Court granted certiorari and reversed, rejecting the Establishment Clause defense (for much the same reasons it was rejected in *Agostini*) and accepting petitioners' affirmative claims for relief (*compare Rosenberger*). There would be no doubt that petitioners would be entitled to attorneys fees. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 1996 WL 537859 (W.D.Va. 1996) (awarding fees). Under the analysis of *Harper*, the result should be no different simply because *Agostini* was decided while the instant case was still in the lower courts. If petitioners would have been entitled to fees if theirs was the case that made "fresh law," they should not be treated

differently simply because *Agostini* was decided while their case was in the midst of litigation.[8]

2. The decision below also conflicts with *Agostini*. In *Agostini*, this Court specifically rejected the premise of the lower courts here: that the Court's Establishment Clause holding in the *Agostini* case broke new ground. To the contrary, this Court held that the governing interpretation of the Establishment Clause *had changed four years earlier* – in the *Zobrest* case: "[I]t was *Zobrest* – and not this case – that created 'fresh law.'" *Agostini*, 521 U.S. at 225. The precise

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[8]The decision below in effect creates a kind of "good faith exception" or "qualified immunity" defense to fees liability under §1988, based on defendants' reliance on subsequently overruled precedent. In addition to being contrary to *Harper*, such an approach directly conflicts with this Court's decisions holding that a defendant's good faith or bad faith is irrelevant for purposes of fee liability under 42 U.S.C. §1988. *Hutto v. Finney*, 437 U.S. 678, 693 (1978); *see also, e.g., Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737-739 (1980) (State Bar Association not insulated from attorneys fees under section 1988, despite lack of fault). Unlike other fee-shifting statutes, section 1988 does not create an exception where the government's position was "substantially justified." (Contrast the Equal Access to Justice Act ("EAJA"), 28 U.S.C. section 2412, which does have such a provision). Section 1988 does not establish a fault-based standard, but an outcome-based standard. *See, e.g., Carhart*, 192 F.3d at 1152.

The lower courts' decision also carves an exception into this Court's decision in *Farrar*, which held that a plaintiff "prevails" when he or she obtains relief by judicial decree, order, or settlement with the defendant. 506 U.S. at 111. Here, petitioners obtained an enforceable consent decree enjoining the State of Minnesota from enforcing the state rule requiring local school districts to discriminate in the provision of special education benefits to children on the basis of religious school attendance. Plaintiffs went on to recover full relief against both school districts, one by settlement and one by permanent injunction. This satisfies *Farrar's* test for prevailing party status. The lower courts nonetheless denied fees, explicitly creating an exception to *Farrar* for the situation of "intervening and dispositive" precedent favorable to the plaintiff – precisely the circumstances for which *Harper* would seem to forbid creation of such an exception.

issue presented in *Agostini* was whether the substantial intervening changes that *had occurred* in the Supreme Court's cases interpreting the Establishment Clause justified, under Fed.R.Civ.P. 60(b)(5), relief from an ongoing injunction issued twelve years earlier in the *Aguilar* case. The Court answered yes, holding that the Court's decisions had already changed the governing interpretation of the Establishment Clause, and that it would be inequitable to continue the injunction under such circumstances – an approach consistent with *Harper's* premise that litigants in other pending matters (including a continuing injunction) should receive the full benefit of new controlling decisions.[9]

II. The Lower Courts are in Conflict Over the Effect of Intervening Favorable Precedent on Plaintiffs' Status as a Prevailing Party under the Fees Statute.

The lower federal courts are badly divided on the precise question decided by the Eighth Circuit: Whether, in an action under 42 U.S.C. §1983, intervening case law *favorable* to a plaintiff's position on an important legal issue defeats the plaintiff's entitlement to attorney fees under 42 U.S.C. §1988, where the plaintiff prevails in obtaining relief in part because of the new, favorable decision? The decision below directly

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[9]What evidently confused the lower courts was this Court's statement in *Agostini* that lower court judges must follow prior precedent unless and until overruled by this Court. 521 U.S. at 237. But it by no means follows from a *lower court's* obligation to follow this Court's judgments – a function of the hierarchy created by Article III – that *state officials* are excused from liability under 42 U.S.C. §1983 (including liability for attorneys fees) where, at the end of the day, their conduct is determined to have been a violation of plaintiffs' civil rights. That was the opinion of the courts below. That holding, however, is directly contrary to *Hutto v. Finney*, 437 U.S. at 693 (reasonableness or good faith not a defense to attorneys fees under §1988), and is a plain misuse of this Court's decision in *Agostini*.

conflicts with recent decisions of both the Fifth Circuit and the Sixth Circuit and with the leading decision of a prominent three-judge district court.

A. The Eighth Circuit's Decision Conflicts with the Fifth Circuit's Decision in *Associated Builders*.

The decision below directly conflicts with *Associated Builders & Contractors v. Orleans Parish School Board*, 919 F.2d 374 (5th Cir. 1990). In *Associated Builders*, plaintiffs challenged a school board's minority set-aside plan for construction contracts as unconstitutional. The defendant school board defended on the merits, but abandoned its defense once this Court decided *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a significant new decision invalidating nearly all such set-aside or quota programs of state and local governments. Plaintiffs applied for fees under section 1988. Defendants argued that, though the goal of plaintiffs' lawsuit had been accomplished, it was *Croson* that led to its change in policy, not the lawsuit, and that plaintiffs therefore should not be awarded fees. *See* 919 F.2d at 378 ("The school board insists that the Supreme Court's decision in *Croson* [rather than the lawsuit] motivated its action.").

The Fifth Circuit rejected the argument, holding that the intervening, dispositive decision in *Croson* (which the Fifth Circuit termed "seminal," *id.* at 377) did not defeat the plaintiffs' entitlement to fees under §1988. *Id.* at 378. The Fifth Circuit noted the sequence of events – suit against the Orleans Parish school board, new decision in *Croson*, change of school board policy to settle the pending suit, in light of *Croson* – and concluded that plaintiffs' lawsuit was a "catalyst" to the defendants' action. *Id.* at 378. The Fifth

Circuit observed that defendants in such a position "'are usually rather reluctant to concede that the litigation prompted them to mend their ways.'" *Id.* (citations omitted). Neither good faith reliance on the uncertain state of the law prior to *Croson*, nor the fact that *Croson* had (so to speak) changed the law midstream, negated plaintiffs' entitlement to fees under §1988. The Fifth Circuit found it sufficient that plaintiffs had obtained the relief they sought, and that the settlement was in part prompted by the suit. *Id.*

The conflict with the decision below is clear. The Eighth Circuit held that an intervening favorable precedent deprives plaintiffs of prevailing party status or, alternatively, is a "special circumstance" justifying denial of fees, if defendants promptly change their position following the new decision. The Fifth Circuit in *Associated Builders* rejected such an approach – even where an intervening precedent was truly dispositive.

B. The Eighth Circuit's Decision Conflicts with the Sixth Circuit's Decisions in *Putnam* and *Perket*.

The decision below also conflicts with the Sixth Circuit's recent decisions in *Putnam v. Davies*, 149 F.3d 1184 (1998) (unpub. op.), *aff'g*, 960 F.Supp. 1268 (S.D. Ohio 1997), and *Perket v. Sec., HHS*, 905 F.2d 129 (1990). The plaintiffs in *Putnam* challenged an Ohio law authorizing seizure of an innocent owner's car if the driver was convicted of a second offense for drunken driving. While the suit was pending, the Ohio Supreme Court declared the law unconstitutional in a different case. The federal district court entered a declaratory judgment for plaintiffs on the basis of the

Ohio Supreme Court decision. Relying on the Sixth Circuit's seminal decision in *Perket, supra*,[10] the court then rejected the defendants' argument that the intervening decision deprived plaintiffs of prevailing party status under §1988:

> The fact that others were engaged in parallel efforts to declare the statute unconstitutional in the state courts and prevailed first does not detract from the effort of the attorneys in trying this case in federal court. Litigation such as this challenging the constitutionality of state statutes can take years, and parallel efforts in state and federal courts should not be discouraged. These parallel efforts would be strongly discouraged if one party's attorneys would be deprived of a statutory award of

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[10]*Perket* is the leading case for the proposition that intervening legal developments *favorable* to plaintiff cannot cut off his fee entitlement if he would have prevailed in any event. *See* 905 F.2d at 132-35. The Sixth Circuit also rejects the notion that a governmental defendant's good faith but erroneous belief that its actions were required by existing law excuses that defendant from fees liability. *City of Cleveland v. Nation of Islam*, 124 F.3d 196, 1997 WL 469533 (unpub.) (6th Cir. 1997), *cert. denied*, 118 S.Ct. 854 (1998).

> [T]he City urges that its good faith belief that it would violate sex discrimination laws if it leased the Convention Center to the Nation of Islam constitutes a special circumstance [justifying] relief from its §1988 responsibilities. Such an argument flies in the face of our prior decisions. We have previously held that a party's 'good faith' is not a special circumstance that justifies a denial of attorney's fees. *This rule applies even where a losing party, like the City, reasonably feels that its discriminatory actions were compelled by law.*" *Id.* at *2 (emphasis added; citations omitted).

> attorney's fees based merely on the fortuitous timing of the two court's judgments.

960 F.Supp. at 1273. The Sixth Circuit affirmed, rejecting defendants' argument (identical to the one made by the Eighth Circuit in this case, *see* 187 F.3d at 836, Pet. App. at 21) that the plaintiff obtained no relief not already required by the intervening favorable precedent. 149 F.3d 1184, 1998 WL 344075 at *4.

Again, the conflicts with the decision below are clear. The Sixth Circuit holds that fees should be awarded to a plaintiff who prevails because of intervening case law, even in the situation of parallel federal and state suits challenging the same statute. The Eighth Circuit here held that fees should be denied in such circumstances, even where only a ***common legal defense*** (here, the Establishment Clause) is raised by different defendants in different suits involving different challenges to different government programs or policies.[11]

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[11]The Ninth Circuit has taken an approach directly opposite to that of the Sixth Circuit, with respect to a case involving parallel state court and federal court litigation presenting the same claim against the same defendant. *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997). *Goehring*, relied on by the Eighth Circuit in the instant case (*see* 187 F.3d at 836; Pet. App. at 21), is in direct conflict with the Sixth Circuit's approach in both *Putnam* and *Perket*. There is thus a direct, two-on-two conflict among the circuits: The Ninth and (now) Eighth Circuits treat intervening favorable precedent in another case as (at least sometimes) defeating a §1983 plaintiff's status as a "prevailing party." The Fifth and Sixth Circuits explicitly reject that approach.

C. The Eighth Circuit's Decision Conflicts with the Decision of the Three-Judge Court in *Arkansas Community Organization.*

Arkansas Community Organization for Reform Now v. State Bd. of Optometry, 468 F.Supp. 1254 (E.D.Ark. 1979) (Henley, Circuit Judge, Eisele & Richard S. Arnold, District Judges) ("*ACORN*") is also directly contrary to the instant case. The underlying litigation in *ACORN* involved a constitutional challenge to a state statute prohibiting advertising by optometrists. The suit was filed prior to this Court's decisions in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which recognized First Amendment protection for "commercial speech." Prior to these cases, the law did not generally recognize commercial speech as entitled to First Amendment protection. The decisions in *Virginia State Board* and *Bates* constituted significant new, intervening decisions "changing the law." In the wake of *Bates*, the governmental defendants in *ACORN* promptly agreed to a consent decree enjoining enforcement of the challenged regulation (just as Minnesota did here), but (also as here) resisted an award of attorneys fees under §1988 on the ground that they had acted in entire good faith and had moved with dispatch to settle the litigation as soon as it had become clear that they were in the wrong. The three-judge court rejected the argument and awarded fees. 468 F.Supp. at 1256. The court went on to reject the State's "good faith" and "change-in-caselaw" arguments:

> Nor is it relevant that the defendants acted in good faith in opposing the plaintiffs' complaint....

> Defendants' argument against the award of fees is, in essence, that they should not be required to bear the cost of the efforts of the plaintiffs' attorneys in light of the unsettled state of the law at the time of filing of the complaint, and in light of the dispatch with which the defendants moved toward settlement once the Supreme Court spoke definitively on the issue of professional advertising.... [citing *Bates* and *Virginia Board*]
>
> If the law is unsettled, the need for court action to clarify the law and to protect the interest of the plaintiffs may be greater, not less, than when the rights and duties of the parties are clear. The purpose of the Act is to ensure the enforcement of plaintiffs' rights, not to punish recalcitrant defendants. This purpose is served if fees are awarded to successful litigants in litigation which defines or redefines the law. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

468 F.Supp. at 1257. The court rejected the idea that defendants could avoid liability for fees by changing their position "once their earlier position became untenable." *Id.* "[D]efendants' willingness to compromise a lawsuit already over a year old does not abrogate the plaintiffs' right to an award of attorney's fees." *Id.*

The decision below directly conflicts with *ACORN*. Here, as in *ACORN*, plaintiffs' lawsuit challenged existing precedent.[12] Here, as in *ACORN*, intervening new case law

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[12]Prior to *Agostini*, plaintiffs had argued that *Zobrest*, not *Aguilar*, was the case most directly on point to this matter involving provision of

vindicated plaintiffs' position on an important issue. (In *ACORN*, the new decision established the claim; here, *Agostini* repudiated a defense.) *ACORN* held that plaintiffs were to be encouraged to bring meritorious litigation challenging prior judicial interpretations and that intervening case law thus should not absolve a defendant of fees liability. *Id.* Here, the Eighth Circuit held that to award fees under such circumstances would unfairly punish the State's reliance on earlier case law and have the improper effect of encouraging litigation challenging such reliance. 187 F.3d at 837-38 (Pet. App. at 23-25).[13]

D. The Issue is of Recurring Importance and is Likely to Arise More Frequently as a Result of the Eighth Circuit's Decision in this Case.

The question of the effect of intervening case law on a plaintiff's entitlement to attorneys fees under §1988 has already arisen in several cases. The lower courts are all over the map (literally and figuratively) on the issue: The Fifth and Sixth circuits take one approach; the Ninth has taken another; the Eighth Circuit, in the decision below, has taken yet another, in direct conflict with that of the Fifth and Sixth but supported (in part, indirectly) by the approach of the Ninth Circuit. The result is cacophony and confusion.[14]

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on-premises special education services at religious schools pursuant to the IDEA (as was precisely the case in *Zobrest*). Plaintiffs argued that *Aguilar* was in any event distinguishable and that, to the extent the cases might appear in tension with one another, *Zobrest* was the more recent, authoritative, and directly pertinent case.

[13]The district court went so far as to suggest that plaintiffs should be denied fees because their suit challenged state policies that were not "*violations*" of section 1983 at all, because they were consistent with precedent at the time. *See* 18 F. Supp. 2d at 1020 (Pet. App. at 89).

[14]As noted above, the lower courts have also been divided over

Moreover, the specific issue presented here is likely to become *more* recurrent in light of the decision of the Eighth Circuit in this case. Prior to the Eighth Circuit's opinion, the cases were reasonably clear that an intervening precedent in a different case not involving a challenge to the same governmental action would provide no basis for a §1983 defendant to avoid fees liability, even if part (or all) of the reason for plaintiff's success was the new precedent. *Associated Builders*, *supra*; *Putnam*, *supra*; *ACORN*, *supra*. There was thus little or no incentive for a governmental defendant to resist payment of attorneys fees on such a theory. But if a governmental defendant may seize on new, adverse precedent as a ground for avoiding payment of attorneys fees in litigation, engaged in for months or even years, that now appears a lost cause, there doubtless will be many more cases in which the government claims an autonomous change-of-mind by virtue of "new" case law inconsistent with its position in some respect.

Consider, for example, the many cases now pending before this Court presenting unsettled questions of constitutional law. The Court's decisions this Term will provide significant "new law" on issues ranging from compulsory student activity fees at state universities (*Board of Regents v. Southworth*, No. 98-1189) to laws restricting speech outside abortion facilities (*Hill v. Colorado*, No. 98-1856) to topless dancing restrictions (*Erie, Pa. v. Pap's A.M.*, No. 98-1161) to government assistance to religious schools (*Mitchell v. Helms*, No. 98-1648), to laws banning partial-birth abortion (*Stenberg v. Carhart*, No. 99-830) to religious ceremonies preceding public school programs or events (*Santa Fe Independent School District v. Doe*, No. 99-62), to state

closely related causation questions in §1988 fee litigation ever since this Court's decision in *Farrar*. *See Laidlaw*, 120 S.Ct. at 711-12.

laws regulating private groups' membership practices (*Boy Scouts of America v. Dale*, No. 99-699), to state laws affecting parental rights (*Troxel v. Granville*, No. 99-0138).

Many of these same issues are, of course, presented in litigation challenging state action pending in other lower courts. (Indeed, that is often the reason this Court grants review of an issue.) If, in any of these cases, this Court invalidates government action analogous to government action challenged in a pending lower court case (or rules against an argument analogous to one made by a state in a pending case), the governmental defendants in the pending cases could, under the Eighth Circuit's theory, simply "decide" to change their conduct, citing the new case, and thereby excuse themselves from attorneys fees under §1988.

Given the monetary stakes sometimes involved in fees litigation in major constitutional cases, one can be reasonably certain that governmental defendants will at least *raise* the argument, in every situation in which it is reasonably possible. As the Fifth Circuit noted in *Associated Builders*, governmental defendants "'are usually rather reluctant to concede that the litigation prompted them to mend their ways.'" 919 F.2d at 378. *See also Fee for All: Citadel and ACLU Are At It Again – Now, It's Over Megabucks*, Wall Street Journal (Aug. 6, 1997) at A1 (fees litigation in case challenging constitutionality of state male-only military college, in aftermath of this Court's controlling decision in *United States Virginia*, 518 U.S. 515 (1996)). The incentive to make such a defense will be directly proportional to the likelihood that defendants will lose the litigation on the merits, either as a result of the new decision or because the case is going badly. The Eighth Circuit's remarkable "controlling intervening precedent" exception to §1988 encourages

strategic manipulation by governmental defendants: they may litigate to the hilt (here, for example, for nearly a year), defending an incorrect legal position, and then seize on the fortuity of a new *adverse* precedent that might afford a plausible ground for claiming an autonomous change of mind, thereby excusing themselves from fee liability. The Eighth Circuit's decision, left unreviewed, is thus likely to generate considerable mischief – quite apart from the extant conflict with the decisions of other circuits – in every circuit that has not already explicitly ruled to the contrary.

III. The Eighth Circuit's Opinion Conflicts with Ethical Rules and Professional Responsibilities Binding on Attorneys in 42 U.S.C. §1983 Litigation.

Perhaps the most disturbing aspect of the decision below is its holding that attorneys fees should be denied to a prevailing party if counsel does not cease pursuing meritorious claims on behalf of §1983 clients, when it appears that another pending case might result in precedent favorable to his or her client on a significant issue or defense. 187 F.3d at 837 (Pet. App. at 24) (inappropriate for counsel to "continue[] to litigate the matter and incur fees" if he believed *Agostini* would result in favorable precedent against the State's Establishment Clause defense).

With all due respect to the court below, this is little short of outrageous. We cannot believe the Eighth Circuit intended to suggest, in direct conflict with ethics rules, that an attorney should not vigorously and zealously pursue his clients' cause, because he believes intervening case law may *improve* his clients' position! Counsel had an ethical duty to aggressively pursue the case. Model Rules of Professional

Conduct 1.3, Comment. It is unthinkable that counsel should have failed to press the cause of these children with disabilities – forced out of their religious schools by virtue of the State's policy of denying needed special education services to children attending religious schools – when each day continued the legal injury. As it was, Aaron Westendorp and Sarah Peter were forced out of their schools for three and two years, respectively. To suggest that counsel should have sat on their hands, withdrawn motions argued months before certiorari was granted in *Agostini*, failed to pursue discovery in the month before *Agostini* was decided, and not move for relief in time for the 1997-98 school year, is simply unconscionable.

The Eighth Circuit's rule would set a lower ethical standard of zealous representation for lawyers representing clients challenging unlawful state government actions, on pain of forfeiture of statutory attorneys fees. This extraordinary holding itself warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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